United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The

UNITED STATES COURT OF APPEALS

For The

DISTRICT OF COLUMBIA CIRCUIT

No. 18,401

954

WILLIAM D. BLUE, Appellant

UNITED STATES OF AMERICA, Appellee

On Appeal From The United States
District Court for the District of Columbia

Brief for the Appellant

Carroll J. Savage
306 Southern Building
Washington, D.C. 20005

Counsel for Appellant
Appointed by this Court

QUESTIONS PRESENTED

(1) Whether an accused who was neither in custody for another offense nor arrested pursuant to an indictment may be validly convicted when there was a failure to provide him with a preliminary examination as required by Fed. R. Crim. P. 5, or with counsel to advise him whether to waive it.

(2) Whether an immature and uneducated accused can be deemed to have validly waived a preliminary hearing while without assistance of counsel.

(3) Whether the trial court erred in the admission of certain real evidence without proper authentication.

(4) Whether, in a trial on an indictment charging assault with a dangerous weapon, there was sufficient evidence of use of a dangerous weapon to go to the jury.

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JURISDICTIONAL STATEMENT

Appellant was arrested on March 2, 1963. Since he was only seventeen years of age the case was referred to the Juvenile Court of the District of Columbia in accordance with Title 11 of the D.C. Code. On March 18, 1963, the Juvenile Court waived jurisdiction over appellant, and on the same date he was taken before the United States Commissioner. A complaint was filed and appellant agreed to waive preliminary examination.

On April 22, 1963, the grand jury returned an indictment on two counts, charging in the first count violation of D.C. Code sec. 22-2901, 31 Stat. 1322 (1901), that is, that on February 24, 1963, appellant robbed one Almont D. Wooden of property of the value of about $82.00; and charging in the second count a violation of D.C. Code sec. 22-502, 31 Stat. 1321 (1901), that is, that on the same date appellant assaulted Wooden with dangerous weapons consisting of a shod foot and an unknown object.

Appellant was arraigned in the United States District Court for the District of Columbia on April 26, 1963 and pleaded "Not Guilty." On November 12, 1963, appellant's motion pro se for suppression of evidence and denial of a speedy trial were denied by Schweinhaut, J. Trial was held on November 12 and 13, 1963, wherein appellant was represented by appointed counsel, and appellant was found guilty on both counts. On January 20, 1964, he was sentenced to two (2) years and six (6) months on each count, the sentences to run concurrently.

Appellant filed an application for leave to appeal without prepayment of costs on January 23, 1964, and on January 28, 1964 the District Court granted the appeal. Present counsel was appointed by this Court on February 11, 1964.

STATEMENT OF FACTS

Upon the trial in the District Court the Government produced the following evidence:

(1) Almont W. Wooden testified that he was walking west on the north side of "U" Street, N.W. on February 24, 1963 at approximately 7:50 or 7:55 p.m., when, a few steps after crossing 12th Street, he became conscious of girls' voices behind him. When one of the girls said "Chicken," he turned, and upon turning back again was struck in the face by an unknown person and knocked unconscious. He later discovered that his wallet containing $80.00 was missing (Tr. 16-20).

(2) Samuel U. Mitchell testified that at approximately the same time and date he was walking west on the north side of "U" Street, N.W. approximately half-way between 11th and 12th Streets, when he observed a scuffle some 50 yards ahead of him. He stated that he saw the victim thrown to the ground and kicked, and that the assailant removed something from the victim's pocket and fled in a southeasterly direction across "U" Street, whereupon he fell some 15 or 20 yeards from Mitchell and his face was illuminated by the lights of a passing car. He testified that the assailant, when he fell, turned and shouted in the direction of three girls who were walking east

on the north side of "U" Street the words: "Moselle, get my hat." Mitchell identified one of the girls as a person known to him as "Mosella." He stated that there were two hats on the ground at the scene; however, he had not seen them fall from anyone's head. One of the girls who was unknown to him went back toward the victim as if to pick up one of the hats, but on Mitchell's warning left the hat on the ground and returned to join the other two girls. Upon arrival of the police, Mitchell stated he pointed out the hat which the girl had started to pick up as the assailant's hat. Finally, he testified that on March 2, 1963 he went to the police station and there identified the defendant as the person he had seen fleeing the scene (Tr. 26-39).

(3) One Dr. Birch read from hospital records concerning the injury suffered by the victim (extensive facial bruising, fractured nose, possible facial fracture) and the treatment administered (Tr. 55-56).

(4) Wooden was recalled and testified that a hat shown to him by the prosecuting attorney was not his hat (Tr. 58-59).

(5) Mitchell was recalled and testified that the hat was the same which he had observed on the sidewalk at the scene of the crime (Tr. 59-60).

(6) Detective Freemont N. Childers of the Metropolitan Police Department identified the hat as that pointed out to him by Mitchell at the scene and kept in his custody until the trial (Tr. 66-70).

(7) The hat was entered into evidence over the objection of the defendant's attorney (Tr. 70).

The defense offered the following:

(1) The defendant testified that he was at his home the entire day of February 24 until approximately 9:00 p.m., at which time he went to a dance at the Odd Fellows Hall, and that he had no knowledge of the alleged crime prior to his arrest (Tr. 76-100). On cross-examination, defendant at the request of the prosecution tried on the hat which was in evidence (Tr. 97)

(2) Mosella Frye testified that she was at the defendant's home with him until approximately 7:30 p.m., at which time she went alone to Ben's Chili Bowl, a restaurant between 12th and 13th Streets, on the north side of "U" Street; that she did not enter the restaurant but after meeting another girl in front of the restaurant decided to return to the defendant's home, whereupon she passed a man lying on the street and encountered the witness Mitchell. She testified that she did not observe what had happened to the man, that upon her return the defendant was waiting for her at his home, and that at approximately 9:00 p.m. they went together to the Odd Fellows Hall (Tr. 100-130).

(3) Elizabeth Blue, the defendant's mother, testified that the defendant was at home with her until approximately 9:00 p.m. (Tr. 131-154).

STATUTES AND RULES INVOLVED

District of Columbia Code:

Section 22-2901, 31 Stat. 1322 (1901):

> Robbery.
>
> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Section 22-502, 31 Stat. 1321 (1901):

> Assault with intent to commit mayhem or with dangerous weapon
>
> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Federal Rules of Criminal Procedure:

Rule 5:

> Proceedings before the Commissioner
>
> (a) Appearance before the Commissioners. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses

against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 52:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

(1) Failure of the United States Commissioner to adequately inform the appellant of his right to a preliminary examination as required by Rule 5 of the Federal Rules of Criminal Procedure and the consequent invalid waiver by appellant of the preliminary examination while without the benefit of counsel invalidates the subsequent conviction.

(2) The error of the District Court in admitting certain prejudicial real evidence without proper authentication requires that the conviction be reversed and a new trial granted.

(3) The District Court's plain error in submitting the second count to the jury where there was insufficient evidence of use of a dangerous weapon constitutes an additional reason for reversal, and the obvious insubstantiality of the count dictates that if a new trial is granted it should be limited to the first count of the indictment.

SUMMARY OF THE ARGUMENT

A. Appellant, at the time a seventeen year-old child with a seventh grade education, was, upon waiver of jurisdiction by the Juvenile Court, taken before the United States Commissioner as required by Fed. R. Crim. P. 5. The Commissioner permitted appellant to waive preliminary examination without the benefit of counsel and without ascertaining that he had the

intelligence, education and maturity necessary to make an intelligent waiver. It is submitted that the resulting failure to accord a preliminary hearing is grounds for reversal because:

(1) The requirement that a hearing be given unless intelligently waived is a separate crucial part of the law enforcement process which may not be dispensed with without impairment of the safeguards provided for persons accused of crime.

(2) Furthermore, lack of assistance of counsel at any stage of the proceedings can prejudice an accused if concessions which may be against his interest are made because of inability to understand the proceedings.

(3) "Informing" an accused of his rights as required by Rule 5 means more than mechanically relating these rights to a young and ignorant accused; rather it requires an imparting of knowledge which in this case could not be assured without the providing of counsel. Since the Commissioner did not do what is required by the specific language of Rule 5, there was "plain error" which should be noticed on appeal despite the failure of court-appointed counsel to raise the question in the District Court.

B. Errors occurring during the trial require that appellant be accorded a new trial. The new trial should be limited to the first count, since the second count is plainly insubstantial and should never have been submitted to the jury. The errors requiring reversal are as follows:

(1) The court below improperly and over the timely objection of appellant's counsel admitted into evidence a hat found at the scene of the crime. The only evidence linking appellant with the crime was the testimony of one eye witness. However, since only if this testimony was believed could there be any inference linking appellant with the hat, the hat could not serve to corroborate the testimony and added nothing to the government's case. Although the hat was properly "identified" as the one found at the scene of the crime it was not "authenticated" by independent evidence linking it with appellant. The trying of the hat on appellant's head had no probative value and could not serve to authenticate the exhibit. Even if there might have been some slight probative value, which is disputed, it clearly was outweighed by the potential prejudice. Since there is a very strong likelihood of prejudice when unauthenticated real evidence is admitted, appellant is entitled to a new trial.

(2) The government failed to offer any substantial evidence that "dangerous weapons, that is, a shod foot and an unknown object," were used by the assailant as alleged in the second count of the indictment. There was no evidence that the assailant used any "unknown object." While there was evidence that the assailant kicked the victim, none was adduced that he was wearing leather-soled shoes, or any shoes at all. Even

if the jury could be permitted to infer that the assailant wore shoes, they could not be permitted to find that, regardless of the characteristics of the shoe, it was a dangerous weapon because it produced injury, since (a) as a matter of law a soft shoe cannot constitute a dangerous weapon and (b) there was no substantial evidence that the victim's injuries were caused by his having been kicked. Thus it was plain error to submit the second count to the jury. Although the sentences on each count run concurrently, this error constitutes an additional reason for reversal because evidence was admitted concerning the extent of the victim's injuries which was relevant only to the issue of use of a dangerous weapon and was probably prejudicial on the count charging robbery. Since the second count is plainly frivolous, the new trial should be limited to the first count and the second count of the indictment dismissed.

ARGUMENT

I. THE CONVICTION MUST BE REVERSED BECAUSE OF FAILURE TO ACCORD APPELLANT A PRELIMINARY EXAMINATION AS REQUIRED BY RULE 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND FAILURE TO PROVIDE HIM WITH COUNSEL AT A CRUCIAL STAGE IN THE PROCEEDINGS.

A. Appellant, a juvenile with little education, could not without the advice of counsel validly waive his right to a preliminary examination.

On March 18, 1963, sixteen days after appellant's arrest by the Metropolitan Police, the Juvenile Court of the District of Columbia waived its jurisdiction over appellant. On the same date appellant was taken before the United States Commissioner and a complaint filed. The Record of Proceedings states, by means of a rubber stamp:

> Complaint prepared. Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel. Defendant was not required to make a statement and was advised that any statement made by him may be used against him. Defendant was advised of his right to cross-examine witnesses against him and to introduce evidence in his own behalf.

Typed below the stamp is:

> Waiver of Jurisdiction by Juvenile Court Presented Dated March 18, 1963. Deft. Waived Preliminary Hearing--

Appellant admits he agreed to waive the preliminary hearing. He says the Commissioner told him he could have counsel if he desired, but no one was present except the detective, the Commissioner, and the appellant. He believed it necessary to decide for himself whether to waive the hearing, and did so because his understanding of what the Commissioner said was roughly as follows:

> Do you want a preliminary hearing or do you want to waive it? Anything you say will go against you in court.

It is not contended here that the above is actually what the Commissioner said. However, the fact that appellant agreed to

forego a hearing without the benefit of advice of counsel, and did so because he thought that anything he said--even in his own defense--would be detrimental to his case in court, points out the inability of a person of appellant's immaturity and meager education to validly waive the hearing. Appellant was only seventeen years old at the time. He had gone as far as the seventh grade in school, but undoubtedly the level of his education was substantially lower. It is requested that this Court hold that under such circumstances there can be no valid waiver of a preliminary hearing without the benefit of advice of counsel.

B. Since appellant was not afforded a preliminary examination as required by Rule 5(a) because without the advice of counsel at an important stage in the proceedings against him, these proceedings were not in accord with the minimum procedural standards requisite to a valid conviction.

The government will undoubtedly invoke the opinion of Judge Keech in United States v. Stevenson, 170 F. Supp. 315 (D.D.C. 1959) as a contrary opinion on similar facts. In the first place, the Stevenson case was not appealed to this Court, which has never been faced with this specific question, although considerable doubt has been cast on that decision by the philosophy apparently underlying this Court's subsequent remarks

in Drew v. Beard, 110 U.S. App. D.C. 198, 290 F.2d 741 (1961). Secondly, the opinion of Judge Keech was not in accord with the weight of reason and authority and was therefore erroneous; however, even if it had been correct when decided it would no longer be good law today, since the tenor of the law in this area has changed significantly since 1959.

The Stevenson case held that the error in the preliminary proceedings which would arise from an invalid waiver of the preliminary hearing would be cured by the subsequent return of a valid indictment by the grand jury. This cannot be correct. The reasoning which must underlie such a proposition clearly runs afoul of principles plainly enunciated by the Supreme Court. The function of Rule 5 is two-fold. First, it assures that the defendant will be informed of his rights, including his right to a preliminary examination. There can be no doubt that that purpose remains unsatisfied when the magic words are uttered but no effort is made to ascertain whether their import is understood, and no counsel is present with the accused to advise him as to their ramifications. Judge Keech did not seem to direct himself to this at all.

It was apparently the second function of Rule 5--determination of probable cause to hold the defendant for commission of a crime--the failure to carry out which Judge Keech concluded would be a ground for habeas corpus prior to

indictment but was of no moment once an indictment was returned. In the first place, this amounts to a holding that when an ignorant accused is involved Rule 5 may be ignored with impunity, since the uncounseled prisoner who did not have sufficient judgment or understanding of the proceedings to know whether or not to avail himself of the preliminary hearing is hardly likely to file pro se a petition for habeas corpus. Furthermore, the mere fact that the grand jury found probable cause cannot cure the defect arising from the fact that the Commissioner did not. In Mallory v. United States, 354 U.S. 449 (1957), Mr. Justice Frankfurter, quoting his words in McNabb v. United States, 318 U.S. 332, 343-44 (1943), reiterated the reasons underlying the adoption of Rule 5 and the statutes which it succeeded:

> The purpose of this impressively pervasive requirement of criminal procedure is plain . . . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard--not only in assuring protection for the innocent but also in assuring conviction of the guilty by methods which commend themselves to a progressive and self-confident society. [Emphasis added.]

354 U.S. 449 at 452. No clearer statement could be found of the proposition that each functionary plays a separate indis-

pensible role. The performance by one of its role cannot cure the failure of another to perform its own. The grand jury might never have been given an opportunity to indict if the Commissioner had failed to find probable cause. To hold that a subsequent indictment can cure the defect arising from failure to provide an accused in custody with this opportunity to free himself would make a mockery of Rule 5.

The Courts of Appeals have not held to the contrary, and in fact have set forth the exceptions which prove the rule. Cases such as Barber v. United States, 142 F.2d 805 (4th Cir.) cert. denied, 322 U.S. 741 (1944); United States ex rel. Dilling v. McDonnell, 130 F.2d 1012 (7th Cir. 1942), Davis v. United States, 210 F.2d 118 (8th Cir. 1954), cert. denied, 351 U.S. 912 (1956); Nelson v. Sacks, 290 F.2d 604 (6th Cir.), cert. denied, 368 U.S. 921 (1961), and United States v. Shields, 291 F.2d 799 (6th Cir.), cert. denied, 368 U.S. 933 (1961), all involved situations in which the defendants were not taken into custody until after an indictment had been found against them. In each case the courts relied upon this fact in refusing relief based on failure to give a preliminary hearing, thus implying that their decisions would have been otherwise if the defendant had been in custody prior to indictment. Similarly, in cases such as Barrett v. United States, 270 F.2d 772 (8th Cir. 1959), and United States ex rel. Bogish v. Tees, 211 F.2d 69 (3d Cir.

1954), the lack of a preliminary hearing was found not to be fatal because the defendant was in custody for a state offense at the time of the indictment, again implying that otherwise the conviction would be reversed. The opinion of the Sixth Circuit in Boone v. United States, 280 F.2d 911 (6th Cir. 1960), affirming 185 F. Supp. 411 (D.C. Ky. 1960), is an unreasoned one, relying on language from the other cases cited above taken out of context, and appears contrary to this Court's recent expression of opinion in Drew v. Beard, supra.

The question presented here is not whether there is a constitutional right to a preliminary hearing--concededly the issue may not be so simply stated. An opportunity for such a hearing is, however, required by rules of procedure binding on the Federal courts. It thus becomes an indispensible part of the process leading to conviction or acquittal of an accused in custody. As part of such process, it is within the area encompassed by the Sixth Amendment guarantee of right to counsel. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court quoted from Powell v. Alabama, 287 U.S. 45, 68-69 (1932), as follows:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence

> irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge necessary to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. [Emphasis supplied.]

304 U.S. 458 at 463. Since the Stevenson case was decided, the Supreme Court has taken further monumental steps which dramatically demonstrate the increasing importance which that tribunal places on this valuable right, and the lengths to which it is willing to go to assure its protection. In its very recent per curiam opinion in White v. Maryland, 373 U.S. 59 (1963), the Supreme Court held that, regardless of whether prejudice resulted, and regardless of whether pleading was required at the preliminary hearing, that hearing constituted a "critical" stage in the proceedings where the accused did in fact plead without the advice of counsel, and that the failure to provide counsel was grounds for reversal. One need entertain little doubt that the Supreme Court would attach a comparable importance to the failure to provide counsel to aid a defendant in the decision of whether to have a preliminary hearing at all. Quoting Hamilton v. Alabama, 368 U.S. 52, 55 (1961), the Court said

> Only the presence of counsel could have enabled the accused to know all the defenses available to him and to plead intelligently.

373 U.S. 59 at 60. The White case thus extended to the preliminary hearing the principle which Hamilton had applied to arraignment, that the guiding hand of counsel is needed "lest the unwary concede that which only bewilderment or ignorance

could justify. . . ." 368 U.S. at 54. See also Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942), and extending the rule of Johnson v. Zerbst to state court proceedings. Thus, although the result reached in Stevenson might be explained on the ground that Judge Keech believed that the right of counsel did not extend to the preliminary hearing, any merit which such a view may have had in 1959 ought certainly to disappear in the light of these recent Supreme Court pronouncements.

C. Reversal of this conviction is essential if Rule 5 is to retain its vitality as a safeguard for the young and ignorant accused who needs it most.

Appellant could not intelligently waive his right to counsel. Without counsel he could not intelligently waive his right to a preliminary hearing. Based on the foregoing, the rule for which appellant contends is this: No waiver of preliminary hearing should be effective unless the Commissioner first provides counsel to advise an accused of the propriety of such a waiver, or satisfies himself that the accused has made a considered and intelligent waiver both of counsel and of the hearing itself. Such a rule is not burdensome. It merely means that there should be available to the Commissioner counsel on whom he can call should an accused be brought before him unrepresented. If he is not entirely satisfied after briefly

questioning the accused that the accused has the intelligence, maturity, education, and judgment to know what is best for him, he shall summon counsel regardless of whether the accused requests that he do so, and provide an opportunity for a conference between them concerning the propriety of a waiver of the preliminary hearing. Occasion for application of this rule will be rare. In some cases accused persons appear before the Commissioner with counsel. In other cases the accused specifically requests counsel. In most of those instances where the accused does not have counsel and none is immediately provided to him, he will nevertheless not agree to waive the hearing. In some of the cases where the hearing is waived without advice of counsel it will be possible for the Commissioner to determine that the accused possessed sufficient education and maturity to make an intelligent waiver. Thus, it is only in the exceptional case that the suggested rule will come into play. But that exceptional case, as exemplified by the facts presented here, is the one that most cries out for a little extra effort by the authorities charged with enforcing the law.

This is the case of a frightened boy--frightened because he is uneducated and because he has grown up against a background of deprivation and ignorance which leads him to blind suspicion of officials and authority, and perhaps also because

he was not old enough to have reached maturity of judgment. Thus, even though appellant asks for a rule of general application to similar cases, as set forth above, it is possible for the Court, if it desires, to confine its decision to the present facts. Appellant's age and educational level appear in the record (Tr. 76-77). Waiver of jurisdiction by the Juvenile Court does not change the fact that he was a "child," as that term is used in the District of Columbia Code. D.C. Code sec. 11-906(b)(3), 52 Stat. 596 (1938) (now D.C. Code sec. 16-2301, 77 Stat. 586 (1963)). To leave the decision as to the conduct of his defense to his judgment alone is to blatantly admit that the safeguards which Rule 5 and the Sixth Amendment were designed to provide may be entirely illusory to those who need them most.

Similarly, although the appellant strongly feels that constitutional issues are involved in the procedure under consideration, this Court need not ground its decision on the Constitution. Because he did not have the advice of counsel when brought before the Commissioner appellant was not given a meaningful opportunity for a preliminary hearing as required by Rule 5. For the same reason, this Court's decision in Moon v. United States, 115 U.S. App. D.C. 133, 317 F.2d 544 (1962), cert. denied, 375 U.S. 884 (1963), does not stand in the way of a reversal here, even though appellant's court-appointed counsel did not raise this issue below. In Moon, a similar assertion to that made here was not passed upon because the point had

not been raised in the District Court and, since the Court felt that the Commissioner did all that Rule 5 required him to do, there was found to be no "plain error" under Fed. R. Crim. P. 52(b). The difference between that case and this is that there the Commissioner "informed" the accused of his right to counsel and accorded him a preliminary hearing. There was no contention that the accused did not understand his rights, as indeed there could not have been since he requested a continuance to obtain counsel. Rule 5(b) requires the Commissioner to

> inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary hearing. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him.

"To inform" is not "to mechanically relate," but "to impart knowledge." The verb "inform" is defined in Webster's New International Dictionary (2d ed. 1934), at p. 1276, as follows:

> To communicate knowledge to; to make acquainted; to acquaint; advise; instruct; notify, enlighten
>
> . . . .
>
> INFORM, APPRISE may often be used interchangeably. But INFORM . . . emphasizes the actual imparting of facts or knowledge of whatever sort; APPRISE . . . frequently carries the implication of giving notice of something.

Appellant may have been "apprised" of his rights, but he was not "informed," as Rule 5(b) requires. Indeed, it is probable that he could not have been, and that only vicariously, through counsel, could the mandatory language of Rule 5(b) have been satisfied.

In view of the "plain error" in the preliminary proceedings, the conviction should be reversed.

II. EVEN IF THE COURT DOES NOT AGREE THAT THE PRE-TRIAL IRREGULARITIES REQUIRE REVERSAL, APPELLANT IS NEVERTHELESS ENTITLED TO A NEW TRIAL BECAUSE OF PREJUDICIAL ERROR IN THE ADMISSION OF EVIDENCE, AND IN VIEW OF THE FRIVOLOUS NATURE OF THE SECOND COUNT THAT COUNT SHOULD BE DISMISSED AND THE NEW TRIAL LIMITED TO THE CHARGE OF ROBBERY.

A. The District Court erred in admitting into evidence over appellant's objection a hat found at the scene of the crime which had no probative value in proving the prosecution's case but which has an obvious tendency to persuade the jury of appellant's guilt.

With respect to this point, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 16-51, 57-73, 97, 162, 168, 177, 187.

The only evidence material to the question of the guilt or innocence of the appellant that was presented in the trial court was the testimony of the witness Mitchell that appellant was the person seen by him escaping the scene. The testimony of the witness Wooden in his first trip to the stand was limited to establishment of the corpus delicti, and the witness was able to cast no light on the identity of his assailant (Tr.16-26).

The testimony of Dr. Birch was directed to the same purpose, and he had no personal knowledge of the incident at all (Tr. 52-56). Therefore, the testimony of Samuel Mitchell on his first appearance (Tr. 26-51), to the effect that he saw, at a distance of fifteen to twenty yards at night, the face of the fleeing assailant, and that six days later he recognized the appellant at the police precinct as the person he had seen, constituted substantially all of the evidence against the appellant in this case.

The case actually presented to the jury by the prosecution, however, was much more lengthy. Three more witnesses were called to the stand: Mr. Wooden, the victim, was recalled (Tr. 57-59); Mitchell was recalled (Tr. 59-65); and Detective Childers was placed on the stand (Tr. 66-73). The government's sole purpose in calling these three witnesses was in connection with a felt hat found at the scene of the crime. Wooden was asked to testify that it was not his hat. Mitchell was asked to identify the hat as the one he saw at the scene. Childers identified the hat as that found at the scene and kept in his custody until the trial, thus allegedly establishing a foundation for introduction into evidence of the hat itself, over the appellant's timely objection (Tr. 70).

There is not a shred of evidence in the record linking the hat with the appellant. In order for the jury to believe

that the hat belonged to appellant it was necessary that they first believe Mitchell's testimony that it was appellant whom he saw fleeing the scene, and even then there would be needed a further inference to link the hat with appellant (Tr. 34). In other words, if the jury believed Mitchell's testimony that he saw appellant escaping the scene, the prosecution would have proved its case. But only if this testimony is believed is there anything to connect the hat with appellant. Therefore the hat logically adds nothing to the government's case. Actually the hat might have been competent evidence if offered by the defense, since the fact that it contained another's initials would tend to show that Wooden's assailant was someone other than appellant. Offered by the prosecution, however, the hat had no evidentiary value whatsoever, and, absent some probative evidence linking the appellant with the hat, was inadmissible as irrelevant to the government's case.

As noted above, the government was careful to establish what it believed to be a proper "authentication" for admission of this real evidence. However, apparently the prosecution was confused as to the meaning of that term in the law of evidence, and the trial court was also led into error in that regard. The term stands, in effect, for two separate and distinct requirements. Of course, before any real evidence can be introduced it must be properly "identified" as the

object which it is alleged to be, i.e., a chain of custody must be established to show that it is one and the same. This the government did at great length by the recalling of two witnesses and the calling of a third. However, this alone does not render the evidence admissible. No one questions that the hat presented at the trial was the one found at the scene of the crime. But there still remains the second, and most central, requirement--that of the connection between the object and the person which provides the displaying of the object with some probative value in the case. See generally 7 Wigmore on Evidence sec. 2129 (3d ed. 1940).

These two separate elements of "authentication" may be illustrated by an example based on the facts of the classic Louisiana case of State v. Foret, 196 La. 675, 200 So. 1 (1941). B was on trial for stealing A's cow. A testified that the sheriff found the cow which had been stolen from him in B's pasture. B testified that the cow which was found in his pasture by the sheriff had been purchased by him from C. At this point A introduced a cow in evidence; on appeal the admission of this evidence was held to be grounds for reversal. There are two reasons why this evidence was inadmissible, although the appellate court's opinion does not clearly sort them out. In the first place, there was no showing that the cow displayed to the jury was the same cow that was found in

B's pasture, i.e., the animal shown to the jury was not properly identified as the one involved in the case, as was the hat introduced below. However, even if that identity had been established, the animal would still have been inadmissible. B did not dispute that the cow brought to court was the same one that was found in his pasture, but maintained that he had purchased that cow from C rather than stolen it from A. Thus introduction of the cow as tending to prove B's connection with the theft was improper.

Similarly here, appellant does not dispute that the hat admitted into evidence was the hat found at the scene of the crime, but denies that he was at the scene. The admission of the hat as tending to prove that he was at the scene without any authentication of the hat as belonging to appellant was therefore improper and prejudicial.

An explanation of this principle of inadmissibility and of the reasons why violation of the principle leads to reversible error may best be made by quoting at length from Wigmore on Evidence. In Volume 4, the author points out that real evidence is liable to cause undue prejudice against an accused and that one reason why this danger arises is a juror's

> natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it.

Professor Wigmore notes that this danger can be prevented by assuring that admissibility will be dependent upon a proper authentication. 4 Wigmore on Evidence sec. 1157, at p. 251. In Volume 7 this requirement is discussed as follows:

> The foundation on which rests the necessity of authentication is not any artificial principle of Evidence, but an inherent logical necessity. For example, when Doe is charged with the murder of Roe, and it is evidenced that someone murdered Roe, but the person killing is not shown to be the accused, the failure of the prosecution is not due to any rule of Evidence, but to the absence of a fact logically inherent in its claim, namely, Doe's identity with the murderer. So, when a knife is offered as J.S.'s knife, with which he did the killing, the proof of the knife's use, and of its finding, leaves unsupplied an essential element in the assertion, namely, J.S.'s use or ownership.
>
> In short, when a claim or offer involves impliedly or expressly any element of personal connection with a corporal object, that connection must be made to appear, like the other elements, else the whole fails in effect. Thus, then, if as part of some facts asserted Doe's letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by Doe; thus a letter alone, without the fact that it is Doe's, is not receivable, simply because it is not the thing offered. By one of the many rules of Evidence, Doe's letter may be admissible; but whatever the particular rule of Evidence may be, the element of Doe's connection with the letter is logically assumed in all.
>
> Now, beyond all this, there is a general mental tendency, when a corporal object is produced as proving something, to assume, on sight of the object, all else that is implied in the case about it. The sight of it seems to prove all the rest. Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand, when Doe is proved to have lost the

horse, that it still remains to be proved that Roe took it; the missing element can clearly be kept separate as an additional requirement. But if the witness to the theft were to have a horse brought into the court-room, and to point it out triumphantly, "If you doubt me there is the very horse!", this would go a great way to persuade the jury of the rest of his assertion and to ignore the weaknesses of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder.

This tendency, illogical though it may be, is deeply rooted in all persons, even the most intelligent and reflective . . . .

This illogical element, and also the mental tendency to forget the importance of proving it, exists wherever any personal connection with a corporal object is assumed in the offer. The necessity of authentication, therefore, applies equally well to chattels,--to a knife, a horse, a coat, or a machine, whenever it is asserted to be connected with a person; and this authentication of objects other than writings is a common necessity of every day's trial practice.

7 Wigmore on Evidence sec. 2129, at pp. 564-65 (3d ed. 1940). See also 4 Wigmore on Evidence sec. 1157 (3d ed. 1940), especially pp. 253-54.

To paraphrase Wigmore with application to the present case:

> Thus, it is easy for a jury, when witnesses speak of an assault by Blue on Wooden, to understand, when Wooden is proved to have been attacked and beaten and the assailant's hat left at the scene, that it still remains to be proved that Blue did it; the missing element can clearly be kept separate as an additional requirement. But if the witness to the assault were to have a hat brought into the courtroom, and to point it out triumphantly, "If you doubt me, here is the very hat!", this would

> go a great way to persuade the jury of the rest of his assertion and to ignore the weaknesses of his evidence of Blue's complicity. The sight of the hat, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder.

The government will probably contend that proper authentication was later supplied when, on cross-examination of the appellant, the hat was tried on his head (Tr. 97). In the first place, the prosecution and the trial court had no knowledge at the time that the hat was offered and admitted as to whether appellant would take the stand (Tr. 71-72); thus the motives of the prosecution were obviously primarily directed towards improperly influencing the jury, as is clearly shown by the use made of the hat in the closing statements to the jury (Tr. 155-63, 172-78), as allegedly corroborating ("in the flesh, as it were") the witness Mitchell's testimony (Tr. 177):

> The hat is found. (Indicating the exhibit.) Whether it was eight feet from the body or whether it was to feet from the body, is that important? The fact is that the hat was found near the body of Mr. Wooden.
>
> Ladies and gentlemen of the jury, Officer Childers testified that Mr. Mitchell pointed to the hat and said, "that is his hat." And some officer picked it up and gave it to him. We know it is the same hat, because the detective had it in his possession until yesterday . . . . The initials "R.B.H." were mentioned by counsel. Concededly they are not the defendant's initials. It is a Goldheim hat. He probably didn't get it from there. He probably got it from somebody. We submit it is a circumstance which corroborates Mr. Mitchell's testimony.

Without regard to the government's motives, however, it is absurd to contend that the placing of a hat on a person's head has any probative value in proving his ownership of the hat. The statements of counsel in their closing arguments sufficiently demonstrate this:

> Prosecution (Tr. 162): Now, the hat is in evidence. You saw the defendant put it on. it does fit the defendant.
>
> Defense Counsel (Tr. 168): We saw the hat put on. The hat didn't fit him. It sat on his head like a top. It can't be his hat.
>
> Prosecution (Tr. 177): The defendant, at my request, tried the hat on. He said it doesn't fit him. It may not be a perfect fit. You saw it on his head. There wasn't much difference in the fit. He could easily have worn it.

Even if the debatable fit of a hat could carry some minor probative value, which appellant strenuously disputes, any slight tendency which this might have to strengthen or weaken any element in the case is far overshadowed by the danger of prejudicial effect on the jury. In Parlton v. United States, 64 U.S. App. D.C. 169, 75 F.2d 772 (1935), this Court was faced in an arson prosecution with the question of whether a sample of an automobile floor mat stained with gasoline, which was removed from the defendant's car ten days after the fire, was improperly admitted in evidence. It was held that, although the sample might have some circumstantial probative value (certainly more than the trying on of the hat in this case), there was insufficient authentication of the sample as

representing the condition of the mat at the time of the fire. In response to the government's argument that the error was nevertheless harmless, the opinion states:

> The generally applied rule is that when error appears in the record it is presumed to be injurious unless it appears beyond any doubt that it did not and could not prejudice the rights of the parties.

64 U.S. App. D.C. 169 at 173, 75 F.2d 772 at 776. As noted above, the only logical function that the evidence could have in the case would be favorable to appellant. But it is the illogical tendencies of the normal juror which renders unauthenticated evidence inadmissible. A realization of this tendency no doubt led to defense counsel's objection to the admission of the hat, an objection which had to be made but which, when once overruled, did more harm than good to appellant's case by further suggesting to the jury that the hat had some tendency to show appellant's guilt. Finally, even if the error could have been mitigated or cured by the trial court cautioning the jury that the hat could not be considered as having any tendency to corroborate Mitchell's testimony that appellant was Wooden's assailant, no such charge was forthcoming. The only reference in the charge to the hat was among the last words addressed to the jury before they retired (Tr. 187):

> I won't send this hat into the jury room with you unless, after you get in there, you decide you want it. If so, you can send word through the Marshall at the door, and I will send it in to you.

What possible use could the jury properly have for the hat? This statement, coming at the end of the charge so that it would tend to stick in the juror's minds, and unaccompanied by any cautionary words concerning the lack of probative value of the hat, could only tend to enhance the prejudicial effect already produced. Having objected to admission of the hat at the proper time, it was not incumbent upon appellant to raise further objections at the time of the charge in order to preserve this point on appeal.

B. The District Court erred in submitting the second count of the indictment to the jury because there was no substantial evidence on which a jury could properly find that a dangerous weapon was used.

In connection with this point appellant desires the Court to read the following pages of the reporter's transcript: Tr. 13-15, 19, 28-29, 34-35, 52-56, 159, 175, 178, 185.

The second count of the indictment charges that the appellant

> made an assault on Almont W. Wooden with dangerous weapons, that is, a shod foot and an unknown object.

Even if the jury believed that appellant was the person who assaulted Wooden, they could not possibly find from any legitimate evidence in the case that a dangerous weapon was used.

As the trial judge pointed out in his charge, the indictment is not evidence (Tr. 178). Nor are statements to the jury by the prosecuting attorney (Tr. 13-15, 159, 175) or the judge (Tr. 185) evidence in the case. Yet there is nothing else in the record to support the charge that a dangerous weapon was used.

There is no evidence whatsoever concerning any "unknown object." Neither Wooden nor Mitchell even so much as suggested that Wooden's assailant had any weapon in his hand. Therefore, that portion of the second count must be ignored as surplusage, leaving the allegation of a "shod foot" to support the charge that a dangerous weapon was used.

It is true that it has been held that a shod foot may constitute a dangerous weapon. In State v. Brinkley, 354 Mo. 1051, 193 S.W.2d 49 (1946), the Supreme Court of Missouri said:

> Appellant's use of his leather solid shoes to kick a prone and helpless victim in the head undoubtedly would make them dangerous weapons.

193 S.W.2d at 53. In Medlin v. United States, 93 U.S. App. D.C. 1, 207 F.2d 33 (1953), cert. denied, 347 U.S. 905 (1954), this court followed suit, holding that, "at least when they inflict serious injuries," shoes on feet could constitute dangerous weapons. Appellant does not dispute these decisions. However, he does dispute the proposition that a person may be convicted of assault "with a dangerous weapon, that is, a shod foot," when there is (a) no evidence of the type of shoe worn by the assailant or even that he was wearing shoes at all,

and (b) no substantial evidence that the injuries suffered by the victim resulted from being kicked.

As to the first point, the record is completely barren of evidence that Wooden's assailant wore shoes of any kind. Wooden himself testified only that he was hit in the face and knocked unconscious (Tr. 19). Mitchell, the only witness to the assault, testified that he saw the assailant kicking Wooden (Tr. 28, 35) and that the assailant's clothing consisted of "dark pants and an Army field jacket" (Tr. 34). The assailant might have been barefooted for all the evidence shows. True, it may be a legitimate inference that a person out on the streets on a February evening would be likely to have on shoes. But can a jury also be permitted to make the further inference that the shoes which the assailant <u>probably</u> had on were <u>probably</u> hard-soled shoes? Certainly they could have been tennis shoes, which is the only type of shoe mentioned anywhere in the record (e.g., Tr. 119). An inference that there is no reasonable doubt that the assailant wore hard-soled shoes is clearly not permissible. And equally as clearly, as a matter of law bare feet or feet clad in cloth and soft rubber cannot constitute dangerous weapons. If they could, why not hands? And if hands can be dangerous weapons, what is left to constitute simple assault? "Assault with a dangerous weapon" will have come to mean any assault producing a greater than superficial injury, regardless of whether any weapon at all was used.

There is no reason why the courts should take it upon themselves to so extend the definition of statutory crimes. If the prosecuting authorities, out of an excess of zeal or for some other reason, insist upon charging defendants with crimes which cannot be proved when a lesser offense is readily available, the courts should not come to their aid.

Nevertheless, the government may contend (1) that the jury may be permitted without evidence to find that there was no reasonable doubt that the assailant had on shoes, and (2) that the extent of the victim's facial injuries (Tr. 55) provides sufficient evidence to permit a jury to decide whether a shoe, regardless of its characteristics, is to be treated as a dangerous weapon. In other words, the element of a "dangerous weapon" could be inferred from the injury without a necessity for first making a determination of the physical characteristics of the alleged "weapon." This leads to appellant's second point, which is that even if such a topsy-turvy inference were permissible, in this case there was no substantial evidence that the injuries suffered by the victim resulted from the alleged kicking.

Wooden testified that he was struck in the face while walking by a blow sufficient to knock him unconscious (Tr. 19). The witness Mitchell, when asked to describe what he saw, stated that he saw the assailant "kick the man all in the face and everything" (Tr. 28). However, later during direct examina-

tion when asked to describe specifically what he saw the assailant do to Mr. Wooden, he testified as follows (Tr. 35):

> A. Well, he wrestled Mr. Wooden to the ground and began to kick him.
>
> Q. Where did he kick him?
>
> A. About his face, here, he was all swollen up, in here (indicating).

Thus it is apparent that Mitchell, who was 45 or 50 yards away at the time and "wasn't able to see clearly" (Tr. 29) merely assumed that the kicking he saw was directed at the victim's face because that is where he later found that the victim was injured. On the other hand, there is a strong indication from the victim's own testimony that the blow which caused his facial injury occurred while he was in an upright position rather than afterwards when he was on the ground. Therefore, unless it is permissible for a jury to find that even a bare hand may constitute a dangerous weapon if it causes injuries, the second count should not have been submitted to the jury. The courts have consistently held that a fist is not a "dangerous weapon," regardless of the seriousness of the resulting injury. See People v. Vollmer, 299 N.Y. 347, 87 N.E.2d 291 (1949); Bean v. State, 77 Okla. Cr. 73, 138 P.2d 563 (1943). It has also been held, and we submit quite properly, that where there is no substantial evidence as to what specifically caused the injuries suffered by an assault victim the issue of use of a dangerous weapon should not be submitted to the jury. See State v. Lloyd, 337 Mo. 990, 997, 87 S.W.2d 418, 422 (1935).

The government may invoke the general rule that error on one count cannot amount to error affecting substantial rights within the meaning of Fed. R. Crim. Proc. 52(b) if the accused was convicted on another count with sentence to run concurrently. See Langford v. United States, 106 U.S. App. D.C. 21, 268 F.2d 896 (1959). However, here evidence was admitted concerning the details of the victim's injuries that was relevant only to the second count and which would have been inadmissible on the robbery issue. See the testimony of Dr. Birch (Tr. 52-56). Injury is not an element of the crime of robbery, and certainly evidence of the extent of a victim's injuries is not admissible merely to show "force and violence." D.C. Code sec. 22-2901, 31 Stat. 1322 (1901). Yet there is no way of knowing whether this detailed description of the rather unpleasant injuries suffered by the victim in this case produced a prejudicial effect on the jury's consideration of the robbery charge. There is thus an additional reason why appellant is entitled to a new trial. And in view of the obvious insubstantiality of the allegation that a dangerous weapon was used, the second count should be dismissed and the new trial limited to the charge of robbery.

CONCLUSION

If the Court agrees that appellant's conviction should not be allowed to stand in view of his deprivation of a preliminary hearing and of the advice of counsel in the pre-trial proceedings, the conviction should be reversed with instructions to dismiss the indictment. In any event, the second count must be dismissed as insubstantial and a new trial granted on the first count because of the prejudicial tendency of the irrelevant and unauthenticated evidence which the jury was allowed to consider.

Respectfully submitted,

Carroll J. Savage
306 Southern Building
Washington, D.C. 20005

Counsel for Appellant
Appointed by this Court

April 1964

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18401

WILLIAM D. BLUE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Appellant was brought before the United States Commissioner on a charge of robbery. The Commissioner advised him of his rights in accordance with Rule 5(b) of the Federal Rules of Criminal Procedure, including his right to a preliminary hearing. Appellant, who was without counsel at the time, waived preliminary hearing.

(a) Was this waiver valid?

(b) Even if it was not, can appellant properly challenge its validity for the first time on appeal when he failed to do so below?

2. Was a hat found at the scene of the crime properly admitted into evidence?

3. An eyewitness testified that on a winter evening he saw appellant knock the complainant to the ground and then proceed to kick him in the face. Other evidence showed that the victim was taken to the hospital and treated for a fractured nose, a possible fracture of one of the facial bones, and extensive facial bruises and swelling around the left eye. Appellant himself testified that he was wearing sneakers at the time of the offense.

(a) Was the evidence sufficient to sustain a verdict of guilty of assault with a dangerous weapon, the weapon being a shod foot?

(b) Can appellant raise the issue of sufficiency of the evidence on appeal when he failed to test its sufficiency by means of a motion for judgment of acquittal in the trial court, either at the close of the Government's case or after all the evidence was in?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILLIAM D. BLUE, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed April 22, 1963, William D. Blue was charged with robbery and assault with a dangerous weapon, *viz.*, a shod foot or unknown object. On November 12 and 13, 1963, he was tried by a jury before Judge Schweinhaut of the District Court. The jury found him guilty on both counts, and by judgment and commitment filed January 20, 1964, he was given concurrent sentences of two to six years on each count. This appeal followed.

The victim of the robbery and the assault was identified in the indictment as Almont W. Wooden. Mr. Wooden testified at the trial that shortly before 8:00 o'clock on the evening of February 24, 1963, which was a Sunday, he was walking west along U Street, N. W. He had just purchased a phonograph record at Ninth and U Streets and was on his way home. As he approached Twelfth Street he heard some girls behind him "making a noise" (Tr. 23).

> They were laughing and going on, I guess there were three girls. I wasn't paying much attention to them. I wasn't feeling good. Just as I got across Twelfth Street, right by the barber shop, one of the girls said, "Chicken." I turned my head. When I turned back again, something struck me in my face and knocked me out. (Tr. 18-19)

Mr. Wooden did not see who struck him. The next thing he knew he was lying on the ground. As he recovered consciousness he discovered that his face was all bloody. He pulled himself together, wiped his face off and sat up. Some police officers arrived and asked him if he was missing anything. Mr. Wooden checked his pocket and found that he no longer had his wallet, in which he had been carrying $80 (Tr. 19-20). He picked up his record and his hat (Tr. 21) and rode off in an ambulance to Washington Hospital Center, where x-rays revealed a fractured nose and a possible fracture of one of the facial bones. The hospital records also indicated that he had "a bruise on the left side of his face, was quite extensive, with a lot of swelling around his left eye" (Tr. 55). He was given a tetanus shot and treated for the fractures (Tr. 56).

The Government's key witness was Samuel U. Mitchell. Mr. Mitchell testified that he was walking west on U Street on the evening in question when he noticed a scuffle going on about forty-five or fifty feet ahead of him. The scuffle was between two men, whom he later identified as appellant and Mr. Wooden. "It was dark, but there was

plenty of light from the night lights" (Tr. 29), and nothing was blocking Mr. Mitchell's vision. He saw appellant wrestle Mr. Wooden to the ground. The witness testified:

> And then I saw the defendant kick the man all in the face and everything and went into his pockets and took an object out,[1] and then he ran. (Tr. 28)

Appellant ran diagonally across the street in front of a car, and as he did so he slipped or stumbled and fell just on the other side of U Street. The headlights of the passing car illuminated appellant's face, and Mr. Mitchell recognized him as someone he had seen before (Tr. 30). Meanwhile Mr. Mitchell had drawn closer to the scene of the scuffle, and as he approached he saw three girls, one of whom he knew by the name of Moselle (Tr. 37; see Tr. 124). He asked the girls if they had anything to do with what had happened, and Moselle said no (Tr. 32). Just then, as appellant was picking himself up after his fall, he called across the street, "Moselle, get my hat" (Tr. 32-33). It was at this point that Mr. Mitchell saw his face with the light shining on it from the passing car.[2] One of the girls other than Moselle turned around to get the hat,[3] but Mr. Mitchell told her to leave it alone. The hat remained on the ground until it was retrieved by the police (Tr. 61, 68-69). It was kept in police custody until the trial and was offered into evidence by the Government (Tr. 69-70).

Appellant's defense was alibi. He testified that he had been at home with his family all day until around 8:00 or 8:30 or 9:00 in the evening (Tr. 78-79), at which time he went to a dance at the Odd Fellows Hall on Ninth

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[1] Mr. Mitchell later testified: "I didn't see what he took, but I knew he took something out of it" (Tr. 35).

[2] "I got a good look when he turned around and said, 'Moselle, get my hat.' That's when I really got a good look" (Tr. 36).

[3] There were two hats at the scene (Tr. 34, 42-43, 60). One of them, however, belonged to Mr. Wooden, who took it with him to the hospital (Tr. 21, 62).

Street with Mosella Frye.[4] Mosella had been visiting him during the day. She left around 7:00 to get something to eat, and when she returned appellant took her to the dance. Mosella and appellant's mother testified substantially to the same effect. In the testimony of the three witnesses there were numerous glaring discrepancies,[5] some major, some minor. The prosecutor commented on them in closing argument (Tr. 160-161, 173-174), but they are not relevant to the issues involved in this appeal. All three defense witnesses were in agreement as to the type of shoes appellant wore when he left the house, allegedly to go to the dance, on that February evening. Appellant testified that he was wearing sneakers or tennis shoes (Tr. 80-81, 91-J, 97), as did Mosella (Tr. 119) and appellant's mother (Tr. 135-136). Upon invitation by the prosecutor (Tr. 97) appellant tried on the hat which had been found at the scene of the crime.[6] Evidently it did fit him, although it may not have been a perfect fit (Tr. 162, 168, 177). Appellant denied that the hat was his and stated that he had never owned such a hat[7] (Tr. 96-97). His mother later corroborated this (Tr. 134-135). Appellant stated that on the night of February 24 he had worn a checkered cap to the dance. He was wearing the same cap when he was arrested and testified that he thought it was at the jail with the rest of his personal effects (Tr. 85-86, 96).

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[4] Her name appears as both "Moselle" and "Mosella" throughout the transcript.

[5] For example, appellant testified that he had known Mosella for only two or three weeks before February 24 (Tr. 91-C), whereas Mosella herself testified that she had known appellant for three or four years (Tr. 110).

[6] It will be recalled that by this time the hat had already been introduced into evidence.

[7] The hat found at the scene bore the initials "R.B.H." (Tr. 60-62). When it was offered into evidence, appellant's counsel objected to its admission on the ground that it had "someone else's initials in it." The court overruled the objection (Tr. 70).

At no time during the course of the trial, either at the close of the Government's case (Tr. 73-76) or at the close of all the evidence (Tr. 154), did appellant make a motion for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The record is similarly barren of any challenge to the pre-trial proceedings before the United States Commissioner. Appellant, a juvenile, had been arrested in connection with the robbery of Mr. Wooden, and proceedings were duly initiated in Juvenile Court. Thereafter the Juvenile Court waived jurisdiction in accordance with 11 D.C. Code § 914, and appellant was brought before the United States Commissioner and charged with robbery. The Commissioner advised him of his rights as set forth in Rule 5(b) of the Federal Rules of Criminal Procedure, including his right to retain counsel and his right to a preliminary hearing. At this point appellant was not represented by counsel. He waived preliminary hearing and was held for the action of the grand jury by order of the Commissioner pursuant to Rule 5(c). Never once in the District Court did appellant call into question, by motion or otherwise, the validity of the waiver of his preliminary hearing before the Commissioner.[8]

STATUTES INVOLVED

Title 22, § 502, District of Columbia Code, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, § 2901, District of Columbia Code, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatch-

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[8] The Commissioner's papers, including his transcript of proceedings from which much of this information was obtained, are part of the record on appeal.

ing, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less then six months nor more than fifteen years.

RULES INVOLVED

Rule 5, Federal Rules of Criminal Procedure, provides:

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the de-

> fendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 29(a), Federal Rules of Criminal Procedure, provides:

> **Motion for Judgment of Acquittal.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

SUMMARY OF ARGUMENT

Without having raised the issue below, appellant now maintains that his waiver of preliminary hearing before the United States Commissioner was invalid because he was not represented by counsel at the time. He contends further that the failure of the Commissioner to appoint counsel for him warrants reversal of his conviction. Neither argument has any merit. The right to a preliminary hearing derives solely from Rule 5. Its only purpose is to determine whether there is probable cause to hold an accused for action of the grand jury. It follows that an accused by waiving preliminary hearing (as Rule 5(c) expressly permits him to do) waives only the right not to be held in the absence of a finding of probable

cause. Such a waiver does not require the assistance of counsel in order to be effective. Neither the Constitution nor the Federal Rules confer upon an accused any right to assignment of counsel at preliminary proceedings before the Commissioner. Moreover, even assuming any irregularity in appellant's waiver of preliminary hearing, the defect was cured by the return of a valid indictment. There was no error at all in this respect, let alone "plain error" within the meaning of Rule 52(b).

The hat found at the scene of the crime was properly admitted into evidence. The evidence showed that appellant himself referred to it as "my hat," although at trial he denied ownership. Moreover, one of the girls at the scene at appellant's direction had gone back to retrieve the hat and would have done so but for Mr. Mitchell's insistence that she leave it where it was lying. This evidence adequately and sufficiently connected the hat with appellant to render it admissible.

Having failed to test the sufficiency of the evidence by means of a motion for judgment of acquittal, appellant is precluded from challenging its sufficiency here. But even on the merits his arguments are futile. Under applicable law the jury could justifiably have inferred from other evidence that appellant was wearing shoes, even though the Government did not expressly prove that there were shoes on his feet while he was kicking the complainant in the head. Appellant himself offered testimony from three witnesses that he was wearing shoes. The style of shoe is of no consequence whatever. A shoe on a foot, whether it be hard or soft, is a dangerous weapon if it is used in such a manner as to cause serious bodily harm. The best criterion for determining whether or not any object is a dangerous weapon is the nature of the injury inflicted by it. The extent and the seriousness of the complainant's injuries were established by uncontradicted evidence. The evidence was manifestly sufficient to sustain the conviction of assault with a dangerous weapon, the weapon being a shod foot.

ARGUMENT

1. Appellant validly waived preliminary hearing

"On appeal, appellant's present court-appointed lawyer (who did not represent him at the trial) urges an important and novel point—namely, that the failure to assign counsel in the preliminary proceedings before the United States Commissioner violated his constitutional rights under the Fifth and Sixth Amendments [9]. . . . But the points now made were not raised in the District Court. . . . The District Court was not told of the fact that appellant lacked counsel at the preliminary proceedings, nor was any relief asked on that score." *Moon* v. *United States*, 115 U.S. App. D.C. 133, 134, 317 F.2d 544, 545 (1962), *cert. denied*, 375 U.S. 884 (1963). Appellant suggests, moreover, that the Commissioner's allowing him to waive preliminary hearing without appointing counsel (which the Commissioner has no power to do [10]) is "plain error" of such magnitude as to require dismissal of the indictment (Brief for Appellant, 38). If this Court were to follow such a course as that now urged by appellant, it would be going far beyond the holding of any federal court, including the Supreme Court. Appellant's contentions, though zealously advanced, are clearly without merit.

There is no constitutional right to a preliminary hearing. *Clarke* v. *Huff*, 73 App. D.C. 351, 119 F.2d 204

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[9] Appellant argues that the Sixth Amendment requires the appointment of counsel to represent him before the Commissioner (Brief for Appellant, 16). However, the cases upon which he relies are all due process cases—*e.g.*, *White* v. *Maryland*, 373 U.S. 59 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Powell* v. *Alabama*, 287 U.S. 45 (1932)—thus calling into play the Fifth Amendment rather than the Sixth.

[10] The Legal Aid Agency is authorized by statute (2 D.C. Code § 2202) to make counsel available to represent indigent defendants at proceedings before the United States Commissioner. The statute, however, does not confer upon the Commissioner the power to assign counsel, nor does any other statute or rule.

(1941); *Odell* v. *Burke*, 281 F.2d 782 (7th Cir.), *cert. denied*, 364 U.S. 875 (1960); *Barrett* v. *United States*, 270 F.2d 772 (8th Cir. 1959); *United States* v. *Heideman*, 21 F.R.D. 335 (D.D.C.), *aff'd*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); see *Goldsby* v. *United States*, 160 U.S. 70, 73 (1895). Contrary to appellant's belief, the *only* purpose of a preliminary hearing, "as its history fully discloses," [11] is "to determine whether or not there is probable cause to believe that an offense has been committed and that the defendant has committed it." *Barrett* v. *United States*, *supra* at 775; see *Barber* v. *United States*, 142 F.2d 805, 807 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944). Thus, if the grand jury has already heard the evidence and returned an indictment against an accused, the indictment eliminates altogether any need for a preliminary hearing. *United States ex rel. Bogish* v. *Tees*, 211 F.2d 69 (3d Cir. 1954); *Davis* v. *United States*, 210 F.2d 118 (8th Cir. 1954); *Barber* v. *United States*, *supra*.

The right to a preliminary hearing in this jurisdiction is strictly a creature of the Federal Rules of Criminal Procedure. Rule 5(c) expressly permits an accused to waive this right.[12] The Supreme Court has authoritatively spoken on the effect of such a waiver:

> By waiving preliminary examination, a defendant waives no more than the right which this examination was intended to secure him—the right not to be held in the absence of a finding by the Commissioner of probable cause that he has committed an offense. *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958).

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[11] *United States* v. *Lucas*, 13 F.R.D. 177 (D.D.C.), *appeal dismissed*, 91 U.S. App. D.C. 278, 201 F.2d 182 (1952).

[12] Even if appellant had not affirmatively waived preliminary hearing when he appeared before the Commissioner, his plea to the indictment entered at the time of his arraignment would have operated as a waiver of his right to such a hearing. *United States ex rel. Lawson* v. *Skeen*, 145 F. Supp. 776 (N.D.W. Va. 1956).

Thus appellant's suggestion that a preliminary hearing is a "step in the proceedings against him" at which he "requires the guiding hand of counsel" [13] is without foundation. The Sixth Amendment right to counsel relates only to proceedings in court and not to preliminary proceedings before a committing magistrate. *Council* v. *Clemmer*, 85 U.S. App. D.C. 74, 177 F.2d 22, *cert. denied*, 338 U.S. 880 (1949); *Burall* v. *Johnston*, 146 F.2d 230 (9th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945); *Bryant* v. *United States*, 173 F. Supp. 574 (D.N.D. 1959), *rev'd on other grounds sub nom. Heideman* v. *United States*, 281 F.2d 805 (8th Cir. 1960). Similarly, it is not violative of due process for an accused to be permitted to waive preliminary hearing without counsel. *Odell* v. *Burke*, *supra*. Even *Powell* v. *Alabama*, *supra*, holds no more than that the right ~~and~~ to counsel accrues from the time of arraignment:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid *during that period* as at the trial itself. 287 U.S. at 57 (emphasis added).

See *Spano* v. *New York*, 360 U.S. 315, 324-326 (concurring opinion of Mr. Justice Douglas), 327 (concurring opinion of Mr. Justice Stewart) (1959); *Hawk* v. *Olson*, 326 U.S. 271, 278 (1945). The Supreme Court has consistently refused to extend the right to counsel to any point in the sequence of events prior to indictment,[14] even

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[13] *Powell* v. *Alabama*, *supra* at 69.

[14] *White* v. *Maryland*, *supra*, is not to the contrary. The Supreme Court held that the preliminary hearing *in that particular case* was a critical stage of the proceedings because at the hearing the defendant had entered a plea of guilty. *White* is not applicable in the District of Columbia, because under the Federal Rules a defendant

under the due process clause, which is susceptible of much broader interpretation than the Sixth Amendment. *Spano* v. *New York, supra; Cicenia* v. *Lagay*, 357 U.S. 504 (1958); *Crooker* v. *California*, 357 U.S. 433 (1958).

Neither Rule 5(b) nor Rule 44 confers upon an accused any right to have counsel appointed when he is brought before the Commissioner. Rule 5(b) speaks only of a "right to retain counsel." In view of the fact that this language replaced the term "right to counsel" which appeared in the preliminary draft of the rule, it must be read as a limitation intentionally created. Nor can counsel be appointed under Rule 44, as Note 2 of the Advisory Committee's Notes clearly demonstrates:

> The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses . . . .

More persuasive authority than this could not possibly be found.

Realizing perhaps the weakness of his position, appellant resorts to an outrageous emotional appeal (Brief for Appellant, 18-20) which, although it might sway a jury, has absolutely no place in an appellate court. The false image of appellant as a "frightened boy" may be summarily dispelled by the following words of Judge Learned Hand:

"shall not be called upon to plead" at a preliminary hearing. Rule 5(c), F.R. Crim. P.

It is clear that an accused may prejudice himself by his actions at a preliminary hearing where he is without counsel, and yet his conviction will stand. *Saunders* v. *United States*, 114 U.S. App. D.C. 345, 316 F.2d 346 (1963); *Nance* v. *United States*, 112 U.S. App. D.C. 38, 299 F.2d 122 (1962).

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime. *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

Appellant has quite correctly predicted that appellee would rely on *United States* v. *Stevenson*, 170 F. Supp. 315 (D.D.C. 1959),[15] for indeed the facts in *Stevenson* are identical to those in the case at bar. Stevenson, a juvenile, was arrested and brought before the Juvenile Court, which eventually waived jurisdiction. Thereafter he was presented before the United States Commissioner, who advised him of his rights in accordance with Rule 5(b). He had no counsel and waived preliminary hearing. Court-appointed counsel subsequently filed a motion to dismiss the indictment, which the court denied in the following terms:

> [A]ssuming that the defendant did not intelligently waive preliminary hearing, being without counsel, this does not require dismissal of the indictment. The defendant might have had ground for habeas corpus[16]

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[15] Appellant accurately points out that the decision of the District Court in *Stevenson* was never reviewed on appeal. Stevenson was acquitted of the charges against him after a trial by jury, and consequently no appeal was taken. See District Court docket, Criminal Case No. 1180-58.

[16] Appellant speculates that an "uncounseled prisoner" who waives preliminary hearing "is hardly likely to file *pro se* a petition for habeas corpus" (Brief for Appellant, 14). Appellee disagrees. The habeas corpus docket in the District Court shows that 550 petitions for writs of habeas corpus were filed in 1963, an average of about three every two days. The vast majority of these were *pro se*. Filing such petitions appears to be a favorite pastime among the inmates of the District of Columbia Jail. With the assistance of jailhouse lawyers they raise every conceivable point (and frequently some that are inconceivable) in their efforts to secure their release. When their petitions are dismissed, as they usually are, they apply for leave to appeal *in forma pauperis* from their dismissals. The miscellaneous docket of this Court is cluttered with their applications, again generally filed *pro se*.

> prior to indictment, but even if there were error in the preliminary proceedings, it has now been cured by return of a valid indictment by the grand jury. 170 F. Supp. at 320.

Accord, United States v. *Gray*, 87 F. Supp. 436 (D.D.C. 1949).[17]

In the instant case appellant never moved at any time in the trial court to dismiss the indictment on this ground. He now invokes the "plain error" rule in urging this Court to subscribe to his radical views. But that rule should be applied with caution and only to prevent a clear miscarriage of justice. A convicted defendant must make a strong showing of prejudice in order to justify its invocation. *Gendron* v. *United States*, 295 F.2d 897 (8th Cir. 1961). Appellant has made no such showing. He merely advances the specious contention, unsupported by anything in the record, that the Commissioner's statement pursuant to Rule 5(b) did not meaningfully "inform" him of his rights. He argues further that he probably could have been adequately "informed" only through counsel, "and that only vicariously." Merely to state this preposterous proposition is to refute it. Rule 5(b) says that "the *Commissioner* shall inform the defendant" of his rights. To require the presence of counsel in every case to explain or interpret the Commissioner's words to the accused would be to render the plain language of Rule 5(b) a nullity. Here, as in *Moon* v. *United States*, *supra*, "the Commissioner did exactly what Rule 5(b) required him to do."[18] Accordingly, this Court can-

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[17] *Drew* v. *Beard*, 110 U.S. App. D.C. 198, 290 F.2d 741 (1961), is not in point. This Court held in *Drew* that the fact that an accused is on bond is no reason to deny him a prompt preliminary hearing or to continue it to a future date over his objection.

[18] Inspection of the records of the United States Commissioner reveals that the same rubber stamp of which appellant complains (Brief for Appellant, 11) was also used in the *Moon* case (Commissioner's Docket 1, Case 48). It would really make no difference if the same words were inscribed on the record in the most elegant Spencerian script.

not say that there was "plain error" under Rule 52(b), for truly there was no error at all.

2. The hat was sufficiently authenticated and was properly admitted into evidence

(Tr. 32-37, 42-44, 58-70, 96-97, 162, 168, 177)

Relying on Wigmore and on one Louisiana case,[19] appellant maintains that it was reversible error for the court to receive in evidence a hat which was found at the scene of the crime. Both of these authorities distinguish between identification and authentication of an object offered into evidence at trial. Identification presupposes two or more objects of the same general type, one of which must be established as the particular one under discussion. Authentication, on the other hand, presupposes only one object and refers to it as associated with a particular person, time, or place. Appellant does not dispute the fact, nor can he, that the hat was adequately identified as the one found on the ground next to the prostrate form of Mr. Wooden. Both Mr. Mitchell and the police officer testified positively that it was the very hat, and the officer in his testimony established the requisite chain of custody, if such were needed. Authentication then is the only issue.

In his recitation of the evidence relating to the hat appellant significantly omits all mention of the testimony which clearly links the hat to him. As appellant was fleeing from the scene, he turned and called to one of the girls, "Moselle, get *my hat*." Another girl started after the hat—indeed, she had to step over the unconscious form of Mr. Wooden to get to it (Tr. 61, 63)—but Mr. Mitchell frightened her away. This evidence was more than enough to connect the hat with appellant. In view of the initials "R.B.H." which were stamped inside, it may be assumed that appellant was not the original owner

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[19] *State* v. *Foret*, 196 La. 675, 200 So. 1 (1941). The animal in *Foret*, by the way, was a steer and not a cow.

of the hat. (See Tr. 177.) This is not to say, however, that it did not belong to him on the evening of February 24. His own words to Moselle—"my hat"—indicate that it did. He denied it on the stand, of course, but it was for the jury to determine the question of just whose hat it was. The hat was sufficiently authenticated to render it admissible. It is immaterial that appellant tried the hat on during cross-examination. The fact that it seemed to fit, albeit perhaps not too well, undoubtedly enhanced its probative value but did not affect its admissibility. Indeed, the hat was already in evidence before appellant took the stand. Its admissibility had been established by the testimony of Mr. Mitchell and the detective. Clearly the hat was "adequately and sufficiently linked to the appellant." *Headen* v. *United States*, 115 U.S. App. D.C. 81, 83, 317 F.2d 145, 147 (1963); see *White* v. *United States*, 200 F.2d 509 (5th Cir. 1952), *cert. denied*, 345 U.S. 999 (1953); *Burris* v. *American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941); cf. *Peden* v. *United States*, 96 U.S. App. D.C. 27, 223 F.2d 319 (1955).[20]

3. The evidence of assault with a dangerous weapon was sufficient to sustain the conviction

(Tr. 18-20, 28-29, 33-35, 40, 54-56, 67, 73-76, 80-81, 91-J, 97, 119, 135-136, 154, 185)

A motion for judgment of acquittal pursuant to Rule 29(a) is the standard means of testing the sufficiency of

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[20] Appellant further asserts that the trial judge gave undue emphasis to the hat by mentioning it at the tail end of his charge to the jury. Having failed to say anything about this below, appellant is foreclosed from raising this issue on appeal. Rule 30, F.R. Crim. P. Moreover, it is axiomatic that the charge to the jury must be considered as a whole. *Askins* v. *United States*, 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied*, 351 U.S. 989 (1956); *Kinard* v. *United States*, 69 App. D.C. 322, 101 F.2d 246 (1938); see *Williams* v. *United States*, —— U.S. App. D.C. ——, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963). Read as a whole, the charge clearly contains no prejudicial emphasis on the hat. It should be noted, incidentally, that it was appellant's counsel who in his closing argument first suggested that the hat might be sent to the jury room (Tr. 168).

the evidence in a criminal case. Never once at trial did appellant make such a motion. His failure to do so at the close of all the evidence bars appellate review of its sufficiency. *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953); *Corbin* v. *United States*, 253 F.2d 646 (10th Cir. 1958); *Picciurro* v. *United States*, 250 F.2d 585 (8th Cir. 1958).[21]

Even giving appellant *arguendo* the benefit of a motion he never made, his efforts here fall far short of success. On appeal, if the evidence is alleged to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence actually presented. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945). Examined in this light it was clearly sufficient. The Government did not explicitly prove that appellant was wearing shoes when he kicked the complainant in the head; it did not have to. The season of the year (late winter), the time of day (early evening), and the scene of the crime (a busy street) would readily permit the jury to infer—justifiably—that appellant was indeed wearing shoes. Moreover, appellant himself introduced abundant evidence that he was wearing shoes; he, his girl friend, and his mother all so testified. He is thus precluded from denying the

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[21] Even if appellant had moved for judgment of acquittal at the close of the Government's case, he would have had to do so again at the close of all the evidence to preserve the point for appellate review. By putting on evidence in his own behalf after denial of such a motion at the close of the Government's case, a defendant waives his motion, and its denial cannot be considered on appeal. *Hall* v. *United States*, 83 U.S. App. D.C. 166, 169, 168 F.2d 161, 164, *cert. denied*, 334 U.S. 853 (1948); *Ladrey* v. *United States*, 81 U.S. App. D.C. 127, 130, 155 F.2d 417, 420, *cert. denied*, 329 U.S. 723 (1946); *Corbin* v. *United States*, *supra*; *Mosca* v. *United States*, 174 F.2d 448 (9th Cir. 1949), and cases therein cited at 451 n.10.

efficacy of his own evidence. See *Leyer* v. *United States*, 183 Fed. 102 (2d Cir. 1910).

Whether appellant had on sneakers or hard-soled shoes is utterly immaterial. This Court has expressly held that a shoe on a foot is a dangerous weapon when it causes serious injury. *Medlin* v. *United States*, 93 U.S. App. D.C. 64, 207 F.2d 33 (1953), *cert. denied*, 347 U.S. 905 (1954). No distinction was made in *Medlin* as to the type of footwear used. Virtually any object is or can be a dangerous weapon if it is used in such a manner as to endanger life or inflict great bodily harm. *United States* v. *Johnson*, 324 F.2d 264 (4th Cir. 1963); *Eagleston* v. *United States*, 172 F.2d 194 (9th Cir.), *cert. denied*, 336 U.S. 952 (1949); *United States* v. *Anderson*, 190 F. Supp. 589 (D. Md. 1961). The court correctly charged the jury in this regard (Tr. 185).

The question of an instrument's character as a dangerous weapon is for the jury. *Fall* v. *Esso Standard Oil Co.*, 297 F.2d 411 (5th Cir. 1961), *cert. denied*, 371 U.S. 814 (1962). The best evidence of its dangerousness is "the injury actually inflicted by it." *Hopkins* v. *United States*, 4 App. D.C. 430, 442 (1894). The evidence of the complainant's injuries was substantial and uncontradicted: bruises, blood, broken bones, loss of consciousness, extensive swelling about the face. Mr. Wooden was injured seriously enough to require immediate transportation to the hospital by ambulance. It was the use to which it was put that made appellant's shoe, be it soft or hard, a dangerous weapon. *Medlin* v. *United States*, *supra*; *United States* v. *Johnson*, *supra*. Clearly the evidence was more than sufficient to sustain the conviction.[22]

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[22] This Court does not even need to consider the question of sufficiency of the evidence of assault with a dangerous weapon, since the sentences on the two counts were concurrent. By not challenging the sufficiency of the evidence of robbery appellant *sub silentio* concedes that the robbery was adequately proved. Accordingly his conviction should be affirmed. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Moore* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 18271, decided March 26, 1964); *Redfield* v. *United States*, —— U.S. App. D.C. ——, 328 F.2d 532 (1964).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JOHN A. TERRY,
Assistant United States Attorneys.

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In The

UNITED STATES COURT OF APPEALS

For The

DISTRICT OF COLUMBIA CIRCUIT

No. 18,401

WILLIAM D. BLUE, Appellant

UNITED STATES OF AMERICA, Appellee

On Appeal From The United States
District Court for the District of Columbia

Reply Brief for the Appellant

Carroll J. Savage
306 Southern Building
Washington, D.C. 20005

Counsel for Appellant
Appointed by this Court

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Reply Brief for the Appellant

Appellant believes that the government's brief fails in several important respects to squarely face appellant's arguments, and thus might have a tendency to divert consideration from the contentions which appellant is actually making. An attempt will be made to confine this reply brief to refocusing the issues. In so doing, however, it may occasionally become necessary to refer to arguments made by the government or cases which it cites in order to point out their lack of bearing on the questions which are involved.

The issues will be discussed in the same order as they were presented in appellant's brief-in-chief.

I. LACK OF PRELIMINARY HEARING

The government is correct that appellant believes that both the Fifth and Sixth Amendments of the Federal Constitution may be involved in the failure to accord him a preliminary hearing and that an assurance of the procedural safeguards which were in this case omitted may be found within the area encompassed by modern concepts of these two fundamental articles. However, the massive assault launched by the government on this score is largely misdirected, for, although appellant has no objection to the court resting a decision on constitutional grounds, there is no need in this case to do so.

The Federal Rules of Criminal Procedure plainly require that accused persons held in custody shall be given an opportunity for a preliminary hearing. Machinery designed to provide this opportunity is functioning daily in the District of Columbia, and in the vast majority of cases functioning very satisfactorily. What is required and what is usually done is that the accused is brought before the Commissioner, informed of his rights, including his right to retain counsel, and offered a preliminary hearing. This is done so that the accused will know that he has an opportunity at this point to have tested by an independent official the sufficiency of the grounds on which the police are holding him, that he may have these grounds tested without himself saying anything if he desires to remain silent, and that he may obtain counsel

to assist him in so doing. If the accused takes advantage of this opportunity, clearly the machinery has served its required function. If the accused understands the opportunity which is given him and chooses not to avail himself of it, again the machinery has fulfilled its purpose. Even though the accused does not fully understand, if counsel is present to help him make the choice, or to make it for him if he desires, the safeguard has been properly provided. But if he does not understand, is without counsel to aid him, and thus is neither actually made aware of the opportunity nor given the trained assistance which would make this unimportant, the machinery has broken down. If in such case Rule 5 were deemed to have been satisfied, then the rule, although providing protection for the intelligent, educated, mature, or wealthy prisoners, would in effect have been construed as not necessarily applicable to a prisoner who is less fortunate. Since such a construction is clearly not acceptable, it follows that the rule has been violated.

The only real question is whether the Court is willing to grant relief. The government raises essentially two objections on that point. First, it maintains, relying on United States v. Stevenson, 170 F. Supp. 315 (D.D.C. 1959), that appellant's subsequent indictment renders relief unnecessary (Brief for Appellee, p. 13). Secondly, it argues that failure to raise this issue at an earlier stage precludes consideration of it now (Brief for Appellee, pp. 9 , 14).

If a subsequent indictment can cure any error at the preliminary examination stage, the courts have to a considerable extent disclaimed any supervisory function over what goes on in the pre-arraignment proceedings. Officials can ignore Rule 5 with impunity if they are so inclined, as long as they manage to obtain an indictment before the prisoner (1) becomes aware that he has been deprived of his rights, and (2) is able without trained counsel to (a) determine his correct remedy, (b) get it before the proper court, and (c) obtain a decision. The government's statistics (Brief for Appellee, p. 13 n. 16) on the number of petitions for habeas corpus filed pro se are not impressive. The helplessness of the present appellant in that regard is shown sufficiently by the fact that, assisted no doubt by "jailhouse lawyers," he filed four motions pro se; one was for suppression of evidence, when there was nothing to suppress; two others were for a mental examination and thereafter for failure to provide him with a speedy trial, although the only lengthy delay was caused by the mental examination; the fourth, coming after a full trial in the District Court, was for a bill of particulars. Obviously the mere fact that the lawbooks contain an available remedy in habeas corpus during the period between arrest and the grand jury proceedings is of little more help to the uncounseled accused than is the fact that the lawbooks also contain an available remedy in Rule 5, the right to a probable cause hearing.

Appellant is not asking for a right to counsel, as such, from the time of his arrest. The shortcomings of which appellant complains stem entirely from his inability to validly waive the preliminary examination. If a valid waiver could be made by him only with legal assistance, the necessity for that assistance derives entirely from the requirements of Rule 5 and there is no need to determine the requirements of due process and the Sixth Amendment. The government's reliance (Brief for Appellee, p. 10) on the Advisory Committee's notes under Rule 44 is therefore not in point; the Committee was directing itself to the right to counsel and not to the right to a preliminary hearing in the absence of a valid waiver. Furthermore, a great deal has happened in the area of assistance of counsel since the Advisory Committee wrote two decades ago, and it is largely to demonstrate the expanded concepts of the scope of this right that appellant has cited a number of the recent constitutional decisions of the Supreme Court.

The government's second objection to granting relief in this case is that appellant's court-appointed counsel did not point out the error to the District Court. In the first place, we think we have demonstrated that the error was plain, and that the Commissioner did not do all that is required by the literal wording of Rule 5. See Brief for Appellant, p. 21.

The government's observation (Brief for Appellee, p. 9) concerning the Commissioner's power to appoint counsel is irrelevant. Appellant asks only that the Commissioner refrain from accepting a waiver of the hearing unless counsel is made available or he determines that a valid waiver can be made without counsel. Secondly, when the subject matter of an appeal relates to an error which derives from ignorance and youth, different considerations must govern than in the usual case. A defendant who did not know enough originally to take advantage of his rights may well not know enough later to complain to counsel of his failure to do so. A disadvantage rooted in this kind of helplessness should be corrected at any stage to avoid perpetuation of the same error. If an older or better educated defendant had been involved, the error could not have arisen in the first place, so that to invoke a legal technicality here is to apply that technicality only to those who most need to have it waived.

Besides, the government is not entirely correct in suggesting (Brief for Appellee, pp. 9, 14) that the issue was never raised below. The "Motion to Suppress Evidence" made by appellant several months before trial in the District Court alleges, inter alia, that "appearing before the Commissioner were illegal and in violation of my constitutional rights," stating

that "there was no probable cause for the arrest." Although there is no indication that the court below considered this language in denying the motion to suppress (Tr. 3-4), or that it was ever made aware of the underlying facts, the quoted phrases show at least an inept attempt to raise the issue.

In conclusion, appellant urges that a careful study of the cases on which the government relies does not demonstrate any lack of merit in appellant's contentions. It should especially be noted that Giordenello v. United States, 357 U.S. 480 (1958), from which the government quotes out of context (Brief for Appellee, p. 10), is not even remotely in point. The statement on which the government relies was intended to enhance the defendant's rights rather than to detract from them. Furthermore, the case involved the effect of a valid waiver and not the failure, resulting from acceptance of an invalid waiver, to provide an opportunity for a hearing at all. The Court in Giordenello speaks of a "right not to be held in the absence of a finding by the Commissioner of probable cause," which right was in this case violated. On the other hand, it is clear that the government underestimates the significance of White v. Maryland, 373 U.S. 59 (1963). That case holds that even if the accused is not required to plead at the preliminary hearing, as is the case under the

Federal Rules, if he does in fact plead without assistance of counsel there are grounds for reversal, and this is so regardless of whether prejudice resulted. A thoughtful consideration of this opinion cannot fail to convince the Court that appellant's views are not very "radical." Brief for Appellee, p. 14. They are merely without any clear precedent, as are most cases which come before appellate courts.

II. ERRORS AT TRIAL

A. Improper Admission of Evidence

Despite appellant's admittedly repetitious treatment of this error in his brief-in-chief, it is apparent from the government's response that it either does not understand the argument or chooses to ignore it.

Appellant's contention is essentially that the only possible relevance of the hat in this case was to link the appellant with the robbery and thus corroborate the testimony of the sole identifying witness, Mr. Mitchell. But since the only evidence linking the hat to appellant was the testimony of Mitchell that appellant was the assailant, the hat could not serve to corroborate this testimony without some independent authentication. The government's only points are not responsive to this argument at all. It relies first on the assailant's alleged statement to the girl, "Moselle, get my hat," and secondly on a number of irrelevant cases.

The government suggests (Brief for Appellee, p. 15) that somehow Mitchell's testimony that the fleeing assailant referred to the hat as "my hat" has a tendency to authenticate the hat. It is entirely true that this testimony tends to show that the hat found at the scene belonged to the assailant, a link of proof otherwise missing. But it cannot authenticate the hat as being the hat of appellant without reliance upon the testimony of Mitchell that appellant and the assailant were one and the same. The statement supplies the same link between the hat and the assailant that would have been supplied if Mitchell could have testified that he saw the hat fall from the assailant's head. But appellant does not deny that the hat probably belonged to the assailant. He denies that he was the assailant, and asserts that nothing was introduced to link him with the hat independently of Mitchell's testimony. Again, the only testimony tending to show that the assailant who allegedly called the hat "his hat" was appellant is the testimony of Mitchell, which cannot be thus used to corroborate itself. Mitchell's testimony would certainly have been sufficient to authenticate an item of real evidence which provided an additional relevant link in the chain of evidence. But in this case the only possible relevance of the item is to corroborate the very evidence which is sought to authenticate it, or make it relevant. It is easy to see how the prosecutor and court below

fell into the error of thinking that such circular reasoning could authenticate the hat, but the subtlety of the error cannot make it any less worthy of notice here or any less likely to have prejudiced the jury below.

The cases cited by the government (Brief for Appellee, p. 16) likewise fail to detract from the force of this point. Each appears to have been correctly decided, but none involves a similar issue to that presented here.

In Headen v. United States, 317 F.2d 145, 115 U.S. App. D.C. 81 (1963), the court admitted in evidence the objects which the defendant was accused of having stolen. The prisoner was apprehended by police officers fleeing the scene of the crime. Similarly, in Peden v. United States, 223 F.2d 319, 96 U.S. App. D.C. 27 (1955), the real evidence which was admitted was a vial of narcotics the passing of which constituted the offense being tried, and the defendant was apprehended at the scene. In both cases the real evidence which was admitted represented an essential part of the government's case, an indispensible element in the offense charged, and in neither case was the evidence offered solely, or even partly, to prove the defendant's identity. Those cases involved nothing comparable to the infirmity here, which arises out of the fact that the hat, having no relevance whatsoever to the offense charged unless it was to establish or

corroborate the testimony concerning the assailant's identity, could not be admitted for that purpose unless shown to be somehow connected with the appellant by evidence independent of that which it was offered to corroborate. In other words, the problem here is not merely one of sufficiency of the evidence to support an inference of a connection between the object and the person, as in the Headen and Peden cases, but rather a logical circularity which, when once critically examined, reveals that there was nothing that could legitimately support admission of the evidence for the purpose offered.

White v. United States, 200 F.2d 509 (5th Cir. 1952), also relied upon by the government, is even weaker authority for admission of the hat than the Headen and Peden cases. The defendant was accused of burglary and some tools of a type which could have been used were found hidden in the vicinity of his home. The admission of these tools was held proper. A comparable issue might have arisen in this case, for instance, if the girls had been allowed by Mitchell to retrieve the hat, and a hat of similar description was later found in a garbage can behind appellant's apartment building, or if a blackjack capable of inflicting Wooden's facial wounds had been found in the bushes near appellant's home. In such case, the evidence would clearly have some permissible logical tendency to link appellant with the assault, established by means other

than through the testimony concerning identity which it was offered to corroborate. But the White case is irrelevant to the present issue. The only other case cited by the government, Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941), involves a question of identification of real evidence, and is clearly not in point.

In summary, the hat was not shown to have a connection with the appellant unless this was founded on Mitchell's testimony, and thus the hat could not be used to strengthen that testimony. If the jury believed Mitchell, the government would have made its case, and the hat could add nothing except an illogical and prejudicial tendency to influence the jury which requires that the conviction be reversed.

B. Absence of Evidence of Use of Dangerous Weapon

Appellant believes that the evidence of use of a dangerous weapon was so plainly insufficient that its submission to the jury, along with evidence of the victim's injuries, was error requiring reversal despite the failure of appellant's court-appointed attorney to test its sufficiency below. Appellant's principal reason for including this argument on appeal, however, is to assure that, assuming a new trail is to be granted because of the improper admission of evidence, it will be limited to the robbery count.

The government's contentions here (Brief for Appellee, pp. 16-18) are as frivolous as the charge itself. Although admitting that the prosecution offered no evidence that the assailant wore shoes, it contends that the testimony by appellant's witnesses (who denied that appellant had any connection with the incident) that appellant wore tennis shoes to the Odd Fellows Hall when he left home for the first time that day at an hour after the incident had occurred, can constitute evidence that the assailant wore tennis shoes. This is utter nonsense. If appellant's alibi had been that he could not have committed the assault because he was at the bowling alley, and this were disbelieved, could the government's failure to introduce any evidence of a dangerous weapon be supplied by permitting the jury to infer that the injuries were inflicted with a tenpin? The government's resort to citation of Leyer v. United States, 183 Fed. 102 (2d Cir. 1910), which clearly provides no support for such an assertion, amply demonstrates the absurdity of its contentions.

Of course there was no acceptable evidence that the assailant wore shoes, and, as the government points out, this would have to be inferred from the time of year and other general circumstances. Appellant insists that this is not permissible. The statute, when it speaks of a dangerous weapon, clearly must contemplate that the weapon be identified.

Furthermore, the government ignores completely appellant's showing that there was not even acceptable evidence from which a jury could conclude that the injuries were caused by kicking, unless statements by the prosecution and the court are evidence. True, whether a particular instrument is a dangerous weapon may depend entirely upon the injuries which it inflicts in the particular case, and this is for the jury. But before the jury can decide whether the particular weapon was dangerous, the weapon must first be identified, or at least there must be evidence that some weapon was used. Surely the statute cannot be construed as permitting any assault which produces injury to be tried as assault with a dangerous weapon, without any showing that a weapon was used other than what might be conjectured from the fact that the victim was injured.

Respectfully submitted,

Carroll J. Savage
306 Southern Building
Washington, D.C. 20005
Counsel for Appellant
Appointed by this Court

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